August 28, 2000

Via U.S. Mail & Electronic Mail

United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, D.C. 20460
[civilrights@epa.gov]

Re: **CCEEB's Comments on EPA's Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits [65 FR 39650 et seq.]**

To Whom It Concerns:

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A. the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting; and

B. the Draft Revised Title VI Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the "Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and the 9 Regional

Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

CCEEB provided extensive comments in May of 1998 on EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits (the "Interim Guidance"). Although the Draft Revised Investigation Guidance is significantly improved relative to the Interim Guidance, CCEEB still has serious concerns regarding both the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We appreciate the opportunity to provide comments at this time.

In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

CCEEB appreciates EPA's consideration of these comments. If you have any questions, please contact me at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.

Sincerely,

VICTOR WEISSER
President

VW/CKT
Enclosures

cc: Mr. Jackson Gualco
Mr. Bill Quinn
Mr. Robert Lucas
Ms. Cindy Tuck

COMMENTS OF THE CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE

ON

U.S. ENVIRONMENTAL PROTECTION AGENCY'S

DRAFT TITLE VI GUIDANCE FOR EPA ASSISANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS

AND

DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

[65 FR 39650 et seq.]

August 28, 2000

I. INTRODUCTION

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A) the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance"); and

B) the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and 9 Regional Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

CCEEB provided extensive comments in May of 1998 on EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits (the "Interim Guidance"). Although the Draft Revised Investigation Guidance is significantly improved relative to the Interim Guidance, CCEEB still has serious concerns regarding both the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We appreciate the opportunity to provide comments at this time.

In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

II. COMMENTS THAT PERTAIN TO BOTH THE DRAFT RECIPIENT GUIDANCE AND THE DRAFT REVISED INVESTIGATION GUIDANCE

Following are comments that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.

A. EPA Should Add a Guiding Principle Related to Providing Certainty.

In the Introduction sections of both sets of draft guidance, EPA states guiding principles that EPA proposes to adhere to in the implementation of Title VI and this draft guidance. CCEEB suggests that EPA add the following principle:

> "The guidance, and implementation of the guidance, should provide the greatest possible clarity and certainty for all stakeholders."

CCEEB believes that environmental justice programs must clearly define terms and establish reasonable goals, objectives and methods to demonstrate compliance. Increased certainty for all stakeholders will both improve EPA's ability to provide fair treatment for all people and help to avoid the counterproductive effect of putting the states' economic growth in jeopardy due to uncertainty in environmental permitting programs. Many of the comments that follow relate to the need to provide more clarity and certainty in the proposed terms, processes and procedures.

B. The Guidance Provides No Clear Standards for Determining if an Adverse Disparate Impact that Violates Title VI Exists.

As EPA is aware, the crux of both draft guidance documents comes down to the definitions of key terms that will be used to judge whether or not there is compliance with Title VI. CCEEB recognizes that EPA has added definitions to the Draft Guidance in response to comments on the Interim Guidance. (Many of the comments noted that the Interim Guidance text was so vague that it was impossible to comprehend how the program would be implemented.) Although the inclusion of definitions is a step in the right direction, the proposed terms and the corresponding text in the two draft guidance documents do not provide clear standards for determining if an adverse disparate impact that violates Title VI exists. Clear standards are needed to provide certainty to stakeholders and to allow EPA to evaluate progress in this program. In reviewing this issue we reviewed the proposed definitions of the following terms:

"impact"
"adverse impact"
"significant"
"statistical significance"
"disparity (disparate impact")

EPA proposes to define "impact" as:

> (…) a negative or harmful effect on a receptor resulting from exposure to a stressor (e.g. a case of diseases). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity. [65 FR 39666 and 65 FR 39685]

EPA proposes to define "adverse impact" as:

> a negative "impact" that is determined by EPA to be significant, based on comparison with benchmarks of significance. These benchmarks may be based on law, policy, or science. [65 FR 39665 and 65 FR 39664, emphasis added.]

1. The Proposed Definition of "Significant" is Vague and Ambiguous.

EPA proposes to define "significant" as:

> A determination that an observed value is sufficiently large and meaningful to warrant some action. (See ***statistical significance***.) [65 FR 39667 and 65 FR 39686, emphasis added.]

This definition is vague and ambiguous and should be clarified. On one hand, it defines "significant" as a value that is sufficiently large and meaningful to warrant some action. On the other hand, the reference to "statistical significance" could be read to greatly broaden what is significant by implying that a value is sufficiently large and meaningful to warrant some action if it is statistically significant. Such a definition would be inconsistent with Title VI law. (See below.)

EPA proposes to define "statistical significance" as:

> an inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather that due to an actual difference in the quantities themselves. [65 FR 39667 and 65 FR 39686]

2. The Draft Guidance Fails to Clarify that the "Significance" of Adverse Disparate Impacts Must be Determined by Application of Legal Standards, Rather than by Statistical Methods Alone.

EPA proposes to define "disparity" or "disparate impact" as:

> A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of exposure, risk or other measures of adverse impact. [65 FR 39665 and 65 FR 39684]

At Page 39682 of the notice, EPA states that if the "disparity" is not "significant," the complaint will likely be closed. It is a step in the right direction that EPA is proposing that the disparity must be significant. As noted above, however, with the proposed reference to "statistical significance" in the proposed definition of "significant," it appears that EPA could rely on mere statistical significance to determine that there was a "significant" disparity. At Page 39682, EPA proposes that the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved "statistical deviations" to at least 2 to 3 standard deviations. EPA goes on to say that other factors would be considered in the analysis. For example, at Page 39682, EPA states that one such factor would be whether the level of adverse impact is "a little or a lot" above the threshold of "significance." It is difficult for the reader to comprehend how all this will be implemented in practice – there are no clear standards.

Besides the brief definition of "significant" which is made ambiguous with the reference to "statistically significant," EPA fails to explain the meaning of significance under the law of Title VI. The Supreme Court and other courts have wrestled with the legal question of the "significance" of impacts in numerous cases. Those cases find that a statistical difference is not necessarily a "significant" disparate impact for purposes of establishing a Title VI violation. A determination of whether or not a disparate impact is de minimis, insignificant, or minor, is not a question that can be answered through the use of bare statistics. If the Guidance is to correspond with law, and to be of real assistance in future Title VI administrative complaints, it must not sidestep the difficult legal question but instead clarify the meaning of "significant disparity" under Title VI.

C. The Draft Guidance's Confusing View of Adverse Disparate Impact Places State Permitting Agencies in a Legal Dilemma.

If EPA's expansive and confusing view of "disparate impact" is applied to the states, a permitting agency will find itself on the horns of a legal dilemma. If it grants a permit in accordance with its existing permitting requirements, it later may face EPA's correction under the Guidance's broad and indefinite criteria for what is an adverse disparate impact. If it denies the permit or restricts its terms to accommodate the Guidance's uncertain criteria, it quickly may face the permit applicant's legal challenge that the agency has failed to abide by the terms of its environmental statutory obligations and has applied Title VI overbroadly and unlawfully. Obviously the Guidance should not place the states hovering on this high wire above legal liability and the associated expense and delay. If the Guidance could provide a clearer, lawful set of criteria for identifying prohibited discrimination, this dilemma would not exist, for states simultaneously could honor both their environmental and their civil rights obligations under the federal statutes.

III. COMMENTS SPECIFIC TO THE DRAFT REVISED INVESTIGATIVE GUIDANCE

Following are comments that are specific to the Draft Revised Investigation Guidance. (See also comments in Section II. above that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.)

A. SUBSTANTIVE COMMENTS AND CONCERNS

1. EPA Should Amend the Guidance so that Permit Decisions that Decrease Emissions or Discharges or Simply Allow the Existing Permit Conditions to Continue Would not be the Basis for a Complaint.

At Page 39677 of the Federal Register Notice EPA proposes that:

> Allegations that concern impacts resulting from a recipient's permitting actions can arise in several different contexts:
> 1) The issuance of new permits;
> 2) the renewal of existing permits; and
> 3) the modification of existing permits.

EPA should amend this section of the Draft Revised Investigation Guidance language to provide that permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue would not be the basis for a complaint. (In addition to amending the language quoted above, EPA should delete the bullet on Page 39677 that refers to "permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged.") EPA should also amend Section III.A. regarding the criteria for the acceptance/rejection of a complaint to provide that complaints will be rejected if they pertain to permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue.

In the case of permit decisions that simply allow the existing permit conditions to continue (i.e., permit renewals), the permittee has already invested substantial capital in reliance on the permit. Existing facilities are, by definition, not new facilities, and the law demands different treatment of them. Existing facilities--that already have environmental permits which occasionally come up for renewal--present very different types of considerations for regulatory agencies from those presented by permit applications for entirely new facilities. Existing facilities obviously represent commitments of investment, employees' reliance on jobs, customers' reliance on contracts for goods and services, the dependency of suppliers and community businesses on the existing facility, local governments' land use decisions and interests in property tax and other revenues, etc. It should be emphasized, in this regard, that EPA actions that interfere with investment-backed expectations and vested rights, in as broad a fashion as this Guidance suggests, might very well be found to constitute takings of property for which compensation would have to be paid in accordance with the due process requirements of the Constitution.

2. The Most Effective and Equitable Way to Address Environmental Title VI Violations is Through Programmatic Adjustments that Follow Due Process and are Based on Sound Science.

A permit applicant/holder should be able to comply with zoning requirements and environmental requirements and not fear that its permit will be put into jeopardy even though the facility meets those requirements. At Page 39654 of the Federal Register notice, EPA states correctly that:

> it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists;

> therefore, denial of the permit at issue will not necessarily be an appropriate solution.

EPA goes on to state in the Draft Revised Investigation Guidance at Page 39674 that:

> (…) recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources, including the permit at issue, using the recipient's existing permitting authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, offsets, and emergency planning and response.

CCEEB suggests that EPA clarify this section by providing that an appropriate means of resolution is for the recipient to go back and adjust that portion of its regulatory program that resulted in the Title VI violation – i.e., a programmatic adjustment. Such adjustments should be: 1) based on sound science and equitable considerations; and 2) provide adequate opportunities for public participation.

As a point of information, the California State Legislature is currently advancing legislation (SB 89, Escutia) that would require the California Environmental Protection Agency to review its programs and address any gaps (deficiencies) that prevent its programs from achieving fair treatment for all people. CCEEB is supporting that legislation.

B. PROCEDURAL COMMENTS AND CONCERNS

1. CCEEB Supports EPA's Position that the Filing or Acceptance of a Title VI Complaint Does Not Invalidate a Permit.

At Page 39676, EPA proposes that "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." CCEEB supports this proposal which provides some certainty to permit applicants.

2. EPA Should Amend the Proposed Complaint Procedure to Set a Deadline for Resolution of a Complaint.

The current Draft Revised Investigative Guidance is unfair because permits could remain under challenge for excessively long periods of time. Consistent with Section 120 to Part 7 of Title 40 to the U.S. Code of Federal Regulations (40 CFR 7.120), EPA proposes that a complaint must be filed within 180 calendar days of issuance of the permit. Also consistent with that regulation, EPA proposes that the Office of Civil Rights ("OCR") may waive that time limit for good cause on a case-by-case basis. CCEEB suggests that EPA specify a deadline for final resolution of a complaint. Such a deadline is needed to provide greater certainty to permit holders that make financial investments based on the issuance of the permit.

3. EPA Should Amend the Draft Guidance to Allow the Permit Applicant/Holder and the Local Government Land Use Authority with Jurisdiction Greater Participation in the Investigation Process.

At Page 39673 of the notice, EPA discusses the process for resolution of complaints. EPA states that OCR "may seek participation from the complainant, the permittee, or others." EPA should amend the draft guidance to give the permit applicant/holder and the local government land use authority a right to participate in the investigative process. As EPA is aware, the permit applicant/holder may be directly affected by the resolution of the complaint (particularly if any violation is not addressed on a programmatic basis). As to the land use authority, these local agencies may be pivotal in making land use planning changes that minimize future disparate impacts. They should be allowed to participate in the investigative process.

IV. CONCLUSIONS

As explained in our comments above, CCEEB has serious concerns regarding the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We urge EPA to work to bring more certainty to this program. Increased certainty will improve EPA's ability to provide fair treatment for all people without creating the counterproductive effect of putting the states' environmental programs into a mode of uncertainty.

V. CONTACT INFORMATION

CCEEB appreciates EPA consideration of our comments. If you have any questions, please call CCEEB's President Victor Weisser at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.